Zaharah Mustapha Raja Sewa & Anor v Sagau Batu Bala & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-01(W)-9–01 OF 2016 AND Q-02(W) 184–01 OF 2016
HAMID SULTAN, UMI KALTHUM AND ABDUL RAHMAN SEBLI JJCA
28 MARCH 2018

Native Law and Custom — Land dispute — Native customary rights ('NCR') over land — Claim for trespass and damages — Claim over native customary land which had already been gazetted as native communal reserve under s 6 of the Sarawak Land Code — Parties did not file action to challenge decision of Minister on gazette — Whether allowing claim would defeat purpose of declaration — Whether parties exhausted every avenue provided by law before coming to High Court — Native Courts Ordinance 1992 s 5(3)(a)(i)(iii)

There were two appeals, one by Sagau Batu Bala ('Sagau') and the other by Zaharah Mustapha Raja Sewa ('Zaharah'). Both appeals arose from the decision of the judicial commissioner in dismissing Sagau's claim against Zaharah in the original action and Zaharah's claim against Sagau in the counterclaim but gave them the liberty to pursue their respective claims in the Native Court. Sagau's claim against Zaharah was for trespass on his purported native customary rights ('NCR') land and for damages whilst Zaharah's counterclaim against Sagau was for a declaration that they had NCR over the same land and that therefore, they were not trespassing on the land. The dispute involved competing claims of NCR between two natives. Both Sagau and Zaharah were claiming NCR over land that had already been *gazetted* as native communal reserve under s 6 of the Sarawak Land Code and both of them did not file any action to challenge the decision of Minister on this. In dismissing the claim and counterclaim, the High Court opined that allowing their claims would defeat the very purpose for which the declaration as the native communal reserve was made. Hence the present appeals.

Held, dismissing the appeals:

(1) There was no dispute that the land that Sagau and Zaharah claimed as their NCR land had been *gazetted* as native communal reserve. It was not wrong on the judicial commissioner to take this factor into account. The judicial commissioner was right in dismissing the claims. Neither of them could claim exclusive private rights over land which the law states 'shall continue to be State land' and which are reserved for the whole community in the area (see paras 19–20).

(2) The dispute between Sagau and Zaharah was undoubtedly a dispute between natives over parcels of untitled NCR land within native communal reserve of which both were subject to the same native system of personal law. Section 5(3)(a)(i) and (iii) of the Native Courts Ordinance 1992 stipulates that such disputes shall be heard in the first instance by a District Native Court. By filing their claims at the High Court, Sagau and Zaharah had run foul of the said provision (see para 23).

[Bahasa Malaysia summary

Terdapat dua rayuan, satu oleh Sagau Batu Bala ('Sagau') dan satu lagi oleh Zaharah Mustapha Raja Sewa ('Zaharah'). Kedua-dua rayuan berbangkit daripada keputusan pesuruhjaya kehakiman dalam menolak tuntutan sagau terhadap Zaharah dalam tindakan asal dan tindakan Zaharah terhadap Sagau dalam tuntutan balas tetapi memberi mereka kebebasan meneruskan tuntutan mereka di Mahkamah Anak Negeri. Tuntutan Sagau terhadap Zaharah adalah bagi pencerobohan dalam tanah hak adat negerinya ('HAN') dan ganti rugi manakala tuntutan balas Zaharah terhadap Sagau adalah bagi deklarasi bahawa mereka mempunyai HAN atas tanah yang sama dan dengan itu, tidak menceroboh tanah tersebut. Pertikaian ini melibatkan saingan tuntutan HAN antara dua anak negeri. Kedua-dua Sagau dan Zaharah menuntut HAN terhadap tanah-tanah yang telah diwartakan sebagai 'Native Communal Reserve' di bawah Kanun Tanah Sarawak dan kedua-dua mereka tidak memfailkan apa-apa tindakan mencabar keputusan Menteri tentang ini. Menolak kedua-dua tuntutan dan tuntutan balas, Mahkamah Tinggi berpendapat membenarkan tuntutan mereka akan menewaskan tujuan deklarasi 'native communal reserve' dibuat. Oleh itu, rayuan-rayuan ini.

Diputuskan, menolak rayuan-rayuan:

(1) Tiada pertikaian bahawa tanah-tanah yang Sagau dan Zaharah tuntut sebagai tanah-tanah HAN telah diwartakan sebagai 'native communal reserve'. Tidak salah buat pesuruhjaya kehakiman mengambil kira faktor ini. Pesuruhjaya kehakiman bertindak betul dalam menolak tuntutan-tuntutan mereka. Kedua-dua mereka tidak boleh menuntut hak peribadi atas tanah yang undang-undang nyatakan 'shall continue to be State land' dan dipelihara bagi seluruh komuniti kawasan tersebut (lihat perenggan 19–20).

(2) Pertikaian antara Sagau dan Zaharah, tidak diragui lagi, adalah pertikaian antara anak-anak negeri terhadap bidang-bidang tanah HAN yang tidak berhak milik dalam 'native communal reserve' yang kedua-duanya adalah subjek dalam sistem undang-undang peribadi anak negeri. Seksyen 5(3)(a)(i) dan (iii) Native Courts Ordinance 1992 menyatakan bahawa pertikaian sedemikian hendaklah didengar buat pertama kali oleh Mahkamah Anak Negeri Daerah. Dengan memfailkan

tuntutan-tuntutan mereka di Mahkamah Tinggi, Sagau dan Zaharah telah melanggar peruntukan ini (lihat perenggan 23).]

Notes

For cases on native customary rights over land, see 10(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 798–799.

Cases referred to

Lee Ling Timber Sdn Bhd v Bukit Mas Indah Sdn Bhd & Ors [2015] MLJU 2153; [2015] 1 LNS 1511, CA (folld)

Manggai v Government of Sarawak & Anor [1970] 2 MLJ 41; [1970] 1 LNS 80, FC (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)
Code of Adet Kelabit Order 2008 s 8
Native Courts Ordinance 1992 ss 5(3)(a), (3)(a)(i), (a)(iii), 6(1), 13(1)
Native Communal (Agriculture) Reserve (No 35) Order 2012
Sarawak Land Code (Cap 81) ss 6, 6(1), (3)

Appeal from: Civil Suit No MYY22–33/10 of 2012 (High Court, Miri)

Shankar RP Asnani (Daniel CL Ling with him) (Thomas, Shankar Ram & Co) in Civil Appeal No Q-01(W)-9–01 of 2016 for the appellant.

Pauline Sagau (Sagau Raja & Co) in Civil Appeal No Q-02(W) 184–01 of 2016 for the appellant.

Leslie Linton (Janting Antalai with him) (Batternberg & Talma) in Civil Appeal Nos Q-01(W)-9–01 of 2016 and Q-02(W) 184–01 of 2016 for the third respondent.

Marjanah bt Adenan (Azreen Fasya bt Abu Bakar with her) (State Attorney General's Chambers) in Civil Appeal No Q-01(W)-9–01 of 2016 for the fifth and sixth respondents.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] There were two appeals before us, one by Sagau Batu Bala ('Sagau') and the other by Zaharah Mustapha Raja Sewa and Mustapha Raja Sewa Abdullah @ Roland Agan Kapong (jointly referred to as 'Zaharah' for convenience). Both appeals arose from the decision of the learned judicial commissioner ('JC') of the Miri High Court who dismissed Sagau's claim against Zaharah in the original action and Zaharah's claim against Sagau in the counterclaim but gave them the liberty to pursue their respective claims in the Native Court.

[2] Sagau's claim against Zaharah was for trespass on his purported native customary rights ('NCR') land and for damages, whilst Zaharah's counterclaim against Sagau was for a declaration that they had NCR over the same land and that therefore they are not trespassing on the land. The dispute therefore involved competing claims of NCR between two natives. Having heard arguments, we reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment.

[3] There were no agreed issues to be tried. Nor were there agreed facts, but from the pleadings and the submissions of the parties, the learned JC found the following facts to be undisputed:

(a) the parties are all Kelabits and are natives of Sarawak;

(b) Sagau's ancestors were the original inhabitants of Bario Asal Lembaa, Bario;

(c) Zaharah's late father Kapong Raja was from Kampung Pa Bengar which is outside Kampung Bario Asal Lembaa;

(d) the Kelabits from Pa Bengar had settled in Arul Layun during the Malaysia–Indonesia confrontation of 1963;

(e) Mustapha Raja Sewa Abdullah @ Roland Agan Kapong ('Mustapha') is the Headman of Arul Layun;

(f) Zaharah and Mustapha had converted to Islam;

(g) the Bario Land Committee was established during the Malaysia–Indonesia confrontation; and

(h) by *gazette* notification dated 16 October 2012 No 39 under the title 'The Native Communal (Agriculture) Reserve (No 35) Order 2012' which was deemed to come into force on the 18 January 2011 the areas of land described in the Schedule had been declared Native Communal Reserve for the exclusive use by the Kelabit community of Sungai Ukat Bario, Miri for agricultural purposes ('the native communal reserve').

[4] What is peculiar to both appeals is that Sagau and Zaharah were claiming NCR over lands that had already been *gazetted* as native communal reserve under s 6 of the Sarawak Land Code (Cap 81) ('the Land Code'), which provides as follows:

> (1) The Minister may by order signified in the Gazette declare any area of the State land to be a Native Communal Reserve *for the use of the community having a native system of personal law* and may, by such order or by subsequent order, declare that the customary law of such community in relation to the acquisition, transfer and transmission of rights and privileges in or over land, and in any building or other structure erected

therein, shall apply with such modifications as may be specified or provided for in any such order. A

(2) Save in so far as the contrary may be specified or provided for in any such order or by this section, rights in any land declared to be Native Communal Reserve under subsection (1) shall be regulated by the customary law of the community for whose use it was declared to be reserved. B

(3) Notwithstanding subsection (2), but without prejudice to subsections (4) to (7) inclusive, *any such land shall continue to be State land, and the native community for whose use it was reserved or any member thereof acquiring any rights therein shall hold the same as licensee from the Government*, and if, by virtue of the provisions of this section (including the provisions of any order made under subsection (1)), any individual native customary rights become established, the issue document of title in respect thereof shall be in the absolute discretion of the Director: C D

Provided that the Minister may of his own motion or upon petition review and confirm or amend any exercise of such discretion.

(4) If the Minister is satisfied that any area or part thereof comprised in any declaration under subsection (1) is required for any public purpose as stipulated in section 46, he may direct such area or any part thereof to be resumed by the Government and compensation to be paid by any person lawfully having rights or privileges over such area or part thereof in accordance with Part IV. E

(5) The Minister may, if he considers that the settlement provisions in Part V should be applied to the whole or any part of a Native Communal Reserve, by order signified in the Gazette so direct, and the Director shall in such case proceed accordingly. F

(6) The section shall also apply to native land reserves constituted under section 91 of the former Land Ordinance [Cap 27] (1948 Edition) and Native Communal Areas constituted under rule 19 of the Land Settlement Rules in like manner to all intents and purposes as if they had been constituted by order under this section, save that if the notification issued under that section of that rule, as the case may be, has not specified for which community any reserve was constituted the same shall be deemed to have been reserved for the community which has in fact made use of the same or if any dispute or question arises, for the community for which the Minister may by order issued under subsection (1) subsequently declare it is to be deemed to have been reserved. G H

(7) In any case in which this section applies, the question as to whether any person, whether or not such person is a member of the native community for whose use the reserve is or is deemed to be constituted, may exercise any rights or privileges within such reserve shall be determined by the customary law of such community and by such orders, if any, as may have been made under this section, and, save to the extent that any such person may be able to justify his occupation of any land comprised within such I

A reserve, he shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto. (Emphasis added.)

B **[5]** It is pertinent to note that neither Sagau nor Zaharah had filed any action to challenge the decision of the Minister to declare the area (where the disputed lands were located) as a native communal reserve. This is rather curious given the fact that both claimed to have acquired NCR over the area.

C **[6]** Sagau and Zaharah must therefore be taken to accept that the declaration had been properly made and as such cannot now be heard to say that their NCR over the lands had not been extinguished. Nor can they be heard to say that the declared area is not state land. The simple fact is, the *gazetting* of the area as a native communal reserve is valid and subsisting.

D **[7]** Having directed his mind to s 6 of the Land Code, the learned JC, in para [34] of his grounds of judgment, came to the following conclusions:

E ... My reading of the OA and the AC appear to be that both plaintiff and the defendants NCR claims are in complete ignorance of the facts that their respective claims are now within the declared native communal reserve. Can the court grant such declaration as prayed by the plaintiff and the defendants? My concern is this, both the plaintiff and the defendants had not even sued or challenged or sought compensation from the government for having included their respective NCR lands within the native communal reserve. The plaintiff had not pleaded so in the OA and neither had the defendants in their AC, the defendants had merely made the F government as nominal defendants. Therefore, and it is my view that both the plaintiff and the defendants could not claim and in fact have failed to establish that they have acquired or owned the respective NCR lands in the OA and the AC. I am also of the view that the court should not allow the plaintiff's and the defendants' claim because to do so would defeat the very purpose for which the declaration as the native communal reserve was made. As such the plaintiff's claim against the G defendants for trespass and for damages to his purported NCR land, which is inside the native communal reserve, is not sustainable and ought to be dismissed. The plaintiff therefore cannot claim for trespass since he is not the owner of the said land that was trespassed. For the same reason, the defendants' claim for declaration that they have NCR lands which fall within the native communal reserve is also refused H and dismissed.

[8] Learned counsel for Zaharah contended that the above findings were wrong, and submitted as follows:

I The High Court completely failed to consider that section 6 of the Sarawak Land Code allows for the Minister to gazette and declare any area to be Native Communal Reserve but subject to the condition quoting specifically section 6(1) of the SLC that they '... having a native system of personal law and may, by such order or by subsequent order, declare that the customary law of such community in relation to the acquisition, transfer and transmission of rights and privileges in or over land,

and in any buildings or other structure erected therein, shall apply with such modifications as may be specified or provided for in any such order'. This showed that section 6(1) of the SLC is the power of the Minister to gazette the area as a Native Communal Reserve already having an existing native system of personal laws which must be established prior to Year 1958 and the Trial Evidence of DW1 Pemanca Philip Lakai and DW4 Penghulu Robertson supported the unchallenged personal claims of the Appellants Mustapha to B1 and B2 Areas. The admissions made by PW1 and PW4 Raja Paran referred above smacked and demolished their claims;

Under section 6(2) of SLC (quoting specifically section 6(2) of the SLC 'save in so far as the contrary may be specified or provided for in any such order or by this section, rights in any land declared to be a Native Communal Reserve under subsection (1) shall be regulated by the customary law of the community for whose use it was declared to be reserved', showed that such gazetting of rights are based on previously established NCR rights of Kelabits which must be established prior to 1958 in harmony with section 5 of the SLC and the evidence of DW1 Pemanca Philip Lakai and DW4 Penghulu Robertson Bala for the Appellants are crucial for this;

The learned Trial Judicial Commissioner completely failed to appreciate that The Native Communal (Agriculture) Reserve (No 35 Order 2012) does not create any Native Customary Rights or new Native Customary Rights or new Native Customary Rights prior or post Year 2012 or prior or post 2011 (when it came into force) where words must never be read into the provisions of any Statute or Order declared by the Minister but recognized previously established rights established prior to Year 1958 and which '... shall be regulated by the customary law of the community ... (section 6(2) of SLC read with section 5) (Please see *Sapiee bin Gani & Ors v Naim Cendera Sdn Bhd & Ors and another case* [2013] 10 MLJ 161);

It is therefore clear that The Native Communal (Agriculture) Reserve (No 35) Order 2012 and section 6 of SLC does not create any new rights for PW1 Sagau nor for PW4 Raja Paran and they PW1 and PW4 failed to call any Community Leaders to prove their claims according to strict requirements of '... customary law of the community ... (section 6(2) of SLC) and '... having a native system of personal law ...' (section 6(1));

[9] It is a question of construction. What needs to be determined firstly is the object behind s 6 of the Land Code, and secondly its effect. Going by the plain language of the provision, it is clear that the purpose for which the declaration under s 6(1) was made was 'for the use of the community having a native system of personal law'. It was meant for the benefit of the whole community having such native system of personal law, in this case the Kelabit community of Sungai Ukat, Bario, Miri and not just any individual member of the community.

[10] In other words, all members of the Kelabit community residing at Sungai Ukat, Bario, have rights over the area that has been declared as a native

A communal reserve, and not just Sagau and Zaharah who were claiming and counterclaiming against each other on the basis that they have pre-existing NCR over the disputed lands.

B **[11]** Secondly, and most importantly in the context of the claims against each other by Sagau and Zaharah, the effect of such declaration is that the area 'shall continue to be State land, and the native community for whose use it was reserved or any member thereof acquiring any rights therein shall hold the same as licensee from the Government'.

C **[12]** It is undisputed that both Sagau and Zaharah belong to the Kelabit community residing at the native communal reserve and 'having a native system of personal law' within the meaning of s 6(1) of the Land Code. Such being the case, their rights over the land are therefore subject to sub-s (1) read with sub-s (3) of s 6, meaning to say both of them hold the lands, which are state lands, as licensees from the government.

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[13] Being mere licensees, neither of them has exclusive personal rights over the disputed lands so as to give them the right in law to claim the lands as their personal properties to the exclusion of all other members of the community, and this is so even if, as they strenuously contended, they had acquired NCR over the lands prior to 1958. Their NCR over the lands, if at all, is subject to the provisions of s 6 of the Land Code.

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F **[14]** In fact s 6(3) of the Land Code expressly provides that if any individual NCR had become established, the issue document of title in respect of such rights 'shall be in the absolute discretion of the Director'. This fortifies the view that no one member of the community has any right of monopoly over any land area that has been declared as a native communal reserve pursuant to s 6(1), even if he has acquired NCR over the land.

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[15] If the court were to grant the reliefs sought by Sagau or Zaharah, it will defeat the whole purpose of having the area declared as a native communal reserve for agricultural purposes. It will defeat the object behind s 6 and render the whole provision completely redundant. That could not have been what the State Legislature contemplated when enacting s 6 of the Land Code. The court must act on the assumption that the Legislature does not legislate in vain.

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[16] The combined total area of the lands that Sagau and Zaharah claimed is massive. Sagau's claim of NCR was over the Pa Puek land at Sungai Puek, Bario, which is an area of approximately 82 hectares in size. He claimed that this is his ancestral land. Zaharah's claim on the other hand was over the land area between Pa Puek, Bario and the new Bario Airstrip and the land near the Old Bario Airport, an even bigger area of approximately 118 hectares in size.

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[17] While it is true that the common law respects pre-existing rights under native laws or customs (and there is sufficient adjective law on this point), such rights cannot override the statutory provisions, in this case s 6 of the Land Code. Section 3(1) of the Civil Law Act 1956 expressly excludes the application of the common law where there is written law in force in Malaysia.

[18] Learned counsel for Sagau urged upon us to set aside the learned JC's decision on the ground that it was wrongly pegged on an issue that was not pleaded by the parties, citing the Supreme Court case of *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152. It was pointed out that the learned JC himself acknowledged that none of the parties pleaded the existence of the native communal reserve, as can be seen from the following passages in his grounds of judgment:

> [25] None of the parties to this proceedings had pleaded that there was already this Native Communal (Agriculture) Reserve (No 35 Order) 2012 ... I gave the benefit of the doubt to the plaintiff, the defendants and the intervener that they were probably not aware of the native communal reserve. However, I cannot say the same for the government. The government is expected to know and should have pleaded this in their defence to the defendant's AC ...

[19] The position of the law, as pointed out by learned counsel, is correct except that in the present case, there was no dispute that the lands that Sagau and Zaharah claimed as their NCR lands had been *gazetted* as native communal reserve. It was therefore not wrong, and in fact incumbent, on the learned JC to take this factor into account in considering whether Sagau's claim against Zaharah and Zaharah's counterclaim against Sagau could be sustained.

[20] In the circumstances, and having regard to the provisions of s 6 of the Land Code, we are of the view that the learned JC was right in dismissing Sagau's claim and Zaharah's counterclaim. It is clear that neither of them can claim exclusive private rights over lands which the law says 'shall continue to be State land' and which are reserved for the whole community in the area.

[21] Even if the learned JC was wrong in dismissing Sagau's claim against Zaharah and Zaharah's counterclaim against Sagau on the ground that the disputed area had been declared as a native communal reserve, he was right on another ground, which is, that the claims should have been heard in the first instance by the Native Court, which is a creature of statute and which is inferior to the civil court. In this regard, s 5(3)(a)(i) and (iii) of the Native Courts Ordinance 1992 ('the NCO') is relevant. It provides as follows:

> 5(3)(a) Cases involving disputes between natives in respect of —
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> (i) any land held under native customary rights or which is within a native

A communal reserve declared under section 6 of the Land Code [Cap 81 (1958 Ed)];

(ii) ...; and

(iii) any right to inheritance under native customary law to any land held under native customary rights or within a Native Communal Reserve,

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shall be heard in the first instance by a District Native Court. (Emphasis added.)

[22] Section 5(3)(a)(i) and (iii) above is clear and unambiguous — disputes between natives over land within a native communal reserve declared under s 6 of the Land Code 'shall' be heard in the first instance by a District Native Court.

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[23] The dispute between Sagau and Zaharah was undoubtedly a dispute between natives over parcels of untitled NCR lands within a Native Communal Reserve in respect of which both are subject to the same native system of personal law. By filing their claims in the High Court instead of the District Native Court, both Sagau and Zaharah had run foul of s 5(3)(a)(i) and (iii) of the NCO.

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[24] Effect must also be given to s 8 of the Code of Adet Kelabit Order 2008 under the heading 'Administration of the Adet', which makes specific reference to the NCO. It states:

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8 The Adet Kelabit is governed by the Native Courts Ordinance, 1992 [Ord 9/92] and the Native Customs (Declaration) Ordinance, 1996 [Cap 22]. Whoever deals with the Adet Kelabit must be mindful of these aforesaid Ordinances as well as other existing written laws.

G **[25]** Section 6(1) of the NCO further provides:

6(1) Subject to this Ordinance, a Native Court shall administer and enforce only —

(a) the native law and custom prevailing in the area of the jurisdiction of the court, so far as it is applicable and is not repugnant to natural justice or morality or is not, in principle, in conflict with the provisions of any law in force in the State; and

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(b) any written law which the court may be authorized to administer or enforce.

I **[26]** As for the appeal procedure in a Native Court proceedings, it is prescribed by s 13(1) of the NCO, which is couched in the following language:

13(1) An appeal shall lie —

(a) from the Headman's Court to the Chief's Court;

(b) from the Chief's Court to the Chief's Superior Court:

Provided that the decision of the Chief's Superior Court in respect of all matters under section 5 (except disputes under section 5(3)) shall be final and conclusive and shall not be a subject of appeal to the District Native Court or Resident's Native Court or Native Court of Appeal;

(c) subject to subsection (2), from the Chief's Superior Court to the District Native Court;

(d) from the District Native Court to the Resident's Native Court which shall be constituted by a person for the time being holding or acting in the office of Resident of a Division sitting with not less than two but not more than four assessors who shall be persons whom the Resident has reason to believe are versed in the customary law relevant to the determination of the appeal:

Provided that for the purpose of the speedy dispatch of the business of the Resident's Native Court, the Yang di-Pertua Negeri may appoint any person who has held office as Resident in the State, or such person as he may deem fit or proper to preside in the Resident's Native Court; and the person so appointed may exercise all or any of the powers conferred on a Resident by this Ordinance;

(e) from the Resident's Native Court, by way of petition for revision to the Native Court of Appeal constituted by subsection (3).

[27] So there is, within the native courts system itself, already in place a dispute resolution mechanism to resolve NCR claims or claims over lands within the native communal reserve. This was how the learned JC dealt with the issue:

[44] There is compelling reason why the plaintiff's and the defendants' claims should be heard by the Native Courts. As submitted by the intervener the disputes in this suit involved complicated issues of land-utilisation, land distribution involving customs/adat and native personal law of a native Kelabit community in Bario and therefore the Native Courts are well versed and trained to handle such subject matters of the disputes. I am also of the view that the Sarawak Legislative Assembly had legislated that the native Courts is to hear cases involving disputes between natives in respect of any claim to land held under native customary rights or which is within a Native Communal Reserve declared under s 6 of the Land Code (s 5(3)(a) of the NCO). It is my view that s 5(3)(a) of the NCO in fact makes it mandatory for the Native Courts to hear such claims of lands falling within the Native Community Reserve. It is also my view that in their hearing, the Native Courts could then summon the Ketua Kampung (Lun Ngimat Bawang) of the Bario Asal Lambaa and/or the Bario Land Committee to assist in deciding both the plaintiff's and defendants' claims within the native Communal Reserve according to the Kelabit adat/customary laws. In fact, way back in 1957, the Native Court of Appeal recognised the roles of the Tuai Rumah on community land. The intervener had referred to *Sumbang Anak Sekam v Engkaraing Anak Ajah*, Native Court Appeal No 1 of 1957 ...

[28] We agree with the learned JC. In this regard, reference may be made to the decision of this court in *Lee Ling Timber Sdn Bhd v Bukit Mas Indah Sdn Bhd & Ors* [2015] MLJU 2153; [2015] 1 LNS 1511, which was a case on 'right of way' under the Land Code. Although not directly on point, it provides some guidance as the correct approach when dealing with the issue. This is what Mohd Hishamudin Yunus JCA delivering the judgment of the court said:

> 18. It is our view that the issue requiring our determination is this. Does the High Court have an original jurisdiction to hear and determine the 'right of way' between the parties who cannot come to an agreement as to which track or path constitute a 'right of way' in the context of s 34 of the Land Code?
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> 32. The presence of an appeal provision to the High Court signifies that it is the intention of the legislature that such dispute should be best be dealt with by the Superintendent of Lands and Surveys first as he or she would be the most appropriate person in terms of familiarity of the disputed areas and manpower available from the land office in terms of surveyors and rangers. One must not forget that it is the office of the Superintendent which demarcates areas for the purpose of alienation for TOL and timber areas. Further as this sort of dispute is mainly concerned with factual findings, a person familiar with the intricacy of the disputed area is best suited for such task. Hence we have no problem in holding that the High Court jurisdiction is one of appellate jurisdiction.
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> 34. For reasons stated above, we hold that the High Court does not have original jurisdiction in dealing with disputes concerning 'right of way'. That jurisdiction lies with the Superintendent of Lands and Survey and the High Court only possesses appellate jurisdiction.

[29] In *Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41; [1970] 1 LNS 80, the Federal Court affirmed the refusal by the High Court to make a declaration that the decision of the Native Court was null and void on the ground that no appeal was lodged in the Native Court of Appeal as prescribed by law. This is what the apex court said:

> It is well settled law that the court will not make a declaratory judgment where an adequate alternative remedy is available (see *Halsbury's Laws of England* (3rd Ed, Vol 22, p 749, para 1611). To quote but a few authorities in support of that proposition, Lord Herschell said in *Barraclough v Brown* [1887] AC 615 at p 620:
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> > It was argued for the appellant that, even if not entitled to recover the expenses by action in the High Court, he was, at all events, entitled to come to that court for a declaration that on the true construction of the statute he had a right to recover them. It might be enough to say that no such case was made by the appellant's claim. But, apart from this, *I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover — the very matter relegated to the*

inferior court — determined. Such a proposition was not supported by authority, and is, I think, unsound in principle. (Emphasis added.)

[30] Having regard to the mandatory dictates of s 5(3)(a)(i) and (iii) of the NCO, we are constrained to hold that the alternative remedy prescribed by the NCO must first be exhausted by Sagau and Zaharah before either of them could bring their disputes to the High Court for resolution. The court that has original jurisdiction to adjudicate on their NCR claims is the District Native Court and not the High Court.

[31] Given our view on the effect of s 6 of the Land Code and s 5(3)(a) of the NCO, we do not find it necessary to deal with the evidence as adduced through the witnesses. It is only where the legal hurdles posed by these two statutory provisions had been cleared that it will become necessary to deal with the facts of the case. Be that as it may, we must hasten to add that the learned JC had dealt with the evidence and found that both Sagau and Zaharah failed to prove their claims of NCR over the disputed lands.

[32] This was essentially a finding of fact based on the learned JC's assessment and evaluation of the entire evidence, a finding which an appellate court is loathe to interfere with. On the material before him, we are unable to say with conviction that the learned JC was plainly wrong in arriving at such finding of fact.

[33] For all the reasons aforesaid, we dismiss Sagau's and Zaharah's appeals and affirm the decision of the learned JC. Costs shall be in the sum of RM10,000 to be paid by the respective appellants to each of the respondents.

Appeals dismissed.

Reported by Afiq Mohd Noor